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NO. 710

IN THE

SUPREME COURT OF THE UNITED STATES

I. M. FUTCH, ET AL.,
Petitioners,

vs.

D. C. GREER, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now come the respondents, D. C. Greer, the State Highway Engineer, and the members of the State Highway Commission of the State of Texas, and respectfully file this Brief in Opposition to the Application for Writ of Certiorari.

JURISDICTION

Respondents respectfully suggest that this Honorable Court is without jurisdiction in this case and that no federal question, and certainly no federal question of substance, is presented for adjudication.

Petitioners allege jurisdiction under Title 28, U.S. C.A., Section 1257, on the basis that a right is specially set up or claimed under the Constitution of the United States. It is not entirely clear just what this right is. The suit seeks an injunction to restrain the respondents from laying out and constructing an interstate highway through the city of Amarillo, petitioners being dissatisfied with the route or design, or both, of the proposed highway. No taking of property is involved in this case.

We know of no authority, and petitioners have referred us to none, which holds that petitioners have any constitutional right or privilege to lay out or design interstate or state highways. There is ample authority to the contrary.

QUESTIONS PRESENTED

Petitioners have alleged that two questions are presented in this application, stating their first question as follows:

> "1. Whether the certification by a state highway department that it has considered the economic effects of the location of a Federal-aid highway in conformity with Title 23, United States Code, Section 128(a) is reviewable on the grounds that reasonable consideration was not given such economic effect in the light of the announced purposes of Title 23, United States Code."

Respondents will show that this does not present any constitutional question as far as petitioners' rights are concerned, and at best might give rise to a dispute between the Bureau of Public Roads and the Texas Highway Department. In any event, compliance or non-compliance with this federal law has no bearing on the authority of the State Highway Commission to select locations, construct and maintain highways in this state. True, the State must comply with this law and regulations thereunder to obtain federal funds, and has so complied in this instance, as evidenced by the fact that the project has been approved by the Bureau of Public Roads.

Petitioners state their second question as follows:

> "2. Whether certain provisions of Article 6674w-1, Vernon's Annotated Civil Statutes of the State of Texas, are satisfied by a public hearing being held during which no member of the public was permitted to discuss or express his or her views concerning the design and schematic layout of a Federal-aid highway."

Respondents will show that the factual basis upon which this question is predicated, i.e., that no member of the public was permitted to discuss or express his views concerning the design and schematic layout of the highway, is directly contrary to the facts of record, but in any event this does not present a federal question and our State courts have held in this case that the respondents fully complied with the applicable State statute in conducting the public hearing.

STATEMENT

Pursuant to Article 6674w, Vernon's Texas Civil Statutes, and related articles, the State Highway Commission is given rather broad powers to lay out, construct, maintain and operate a modern State Highway System. As part of this system, a highway traversing the City of Amarillo was planned and was or is being designed in such a manner as to be eligible for participation by the Federal Government in part of its cost. Several routes were studied and considered and the District Engineer of the Texas Highway Department recommended the so-called "Central Route" to his superiors. (Affidavit of Charles W. Smith, District Engineer, Exhibit "A" attached to Defendants' (respondents here) Motion for Summary Judgment.)

To comply with the requirements of the Federal-Aid Highway Act of 1956 (Title 23, United States Code) and specifically Section 128 thereof, a public hearing relative to the route of this highway was conducted on August 2, 1957, at 7:30 p.m. in the Municipal Auditorium in Amarillo. This hearing is described by Mr. Smith in his affidavit as follows:

> "As a representative of the Texas Highway Department and the Texas Highway Commission, I presided over or conducted this public hearing on August 2, 1957 at 7:30 P.M. at the Municipal Auditorium in Amarillo, Texas. Out of the estimated 600 persons who attended this hearing, no less than 22 persons indicated a desire to speak and did speak. Everyone present was afforded the opportunity to speak with reference to the route for Interstate Highway 40. A record was made of the various speakers, their comments, criticisms, and suggestions, and a transcript of this record was forwarded on August 30, 1957 to the Bureau of

Public Roads along with a certification by D. C. Greer, the State Highway Engineer, that due consideration had been given the economic effects of the proposed location of the highway. The central route of such highway through the city of Amarillo was thereupon approved by the United States Bureau of Public Roads and the Texas Highway Commission." (Exhibit A, Defendants' Motion for Summary Judgment, p. 5.)

Following approval of the route of the highway, the State Highway Department's engineering staff prepared schematic plans relative to the design of the highway, showing location and types of structures, tentative location of exit and entrance ramps and frontage roads, and in general the right of way required to construct the facility. Upon completion of these plans, a second public hearing was held on October 29, 1958, in the Amarillo Municipal Auditorium. This hearing was held to comply with the Texas statutory provision contained in Article 6674w-1, Vernon's Texas Civil Statutes, reading as follows:

". . . provided, however, that in the case of any project involving the bypassing of or going through any county, city, town, or village, including Home Rule Cities, the State Highway Commission shall afford the opportunity for not less than one (1) public hearing in the locality before an authorized representative of the State Highway Commission, at which persons interested in the development of the project shall have the opportunity for attendance, discussion and inspection of the design and schematic layout presented and filed with the governing body of such county, city, town or village, including Home Rule Cities, at least seven (7) days before the public hearing, by the State Highway Department."

This hearing is described in Mr. Smith's affidavit as follows:

"On October 21, 1958, I notified the mayor of the city of Amarillo of the schedule of this public hearing and transmitted to him a print of the schematic layout for that section of the highway which traverses the city of Amarillo and advised him that such layout was for his files and to be made available for public inspection for at least one week prior to the date of the proposed hearing.

"On October 29, 1958, a second public hearing was held in the Municipal Auditorium in the city of Amarillo. Beginning at 10 o'clock A.M. on that morning, there was open to the public a vast array of exhibits including the schematic layout of the proposed highway, typical structures, interchange design, and all other features of highway design on a proposed highway. These exhibits were placed in various strategic and public places to be most conveniently available for public inspection and with personnel of the State Highway Department available at each exhibit to answer any and all questions propounded to them by interested citizens. These exhibits remained on continuous display from 10 o'clock A.M. to 6 o'clock P.M., during all of which time representatives of the Highway Department were on duty and answered questions propounded to them by interested citizens.

"7. Wide publicity was given to the public hearing held on October 29, 1958. News stories in prominent positions in the local press were published on several occasions, including the date October 21, 1958 at which time notices appeared in the Amarillo Globe-Times and the Amarillo Daily News.

"8. The formal part of the second public hearing commenced at 2 o'clock P.M. on October 29, 1958 in said Municipal Auditorium in Amarillo in which

full explanation was made of the highway design, the purposes of the highway, as well as the details of the schematic layout. Immediately after, as well as before, the explanation of the project and the schematic layout, full opportunity was afforded all interested citizens to ask specific questions of the representatives of the Highway Department, including myself, about the effect of the highway on their own individual properties and business interests." (Exhibit A, Defendants' Motion for Summary Judgment, p. 6-7.)

On January 19, 1959, this injunction suit was filed by petitioners. The trial court rendered summary judgment for respondents, which action was affirmed by the Texas Court of Civil Appeals at Amarillo in an opinion reported in 353 S.W. 2d 896 and attached to petitioners' application as Appendix "A." The Supreme Court of Texas refused petitioners' application for writ of error, no reversible error.

ARGUMENT AND AUTHORITIES

Question No. 1

Petitioners do not now deny that the public hearing was held August 2, 1957, for the purpose of complying with Title 23, U.S.C.A., Section 128. They do not challenge the fact that the Highway Department certified to the Bureau of Public Roads that due consideration had been given to the economic effects of the proposed highway location. They simply contend that the Highway Department did not give "reasonable consideration" to such effects.

We will not burden this brief with a discussion of the facts (the transcript of the hearing shows that the "economic effect" of the location was the major topic

of the discussions, affidavits show various studies and comparisons were made and economic effects necessarily considered), because it is immediately apparent that this contention cannot affect any constitutional rights of petitioners. Whether state funds exclusively, or part state and part federal funds, are used to pay for the highway has no bearing on the duly delegated authority of the Highway Commission to select locations for highways in this state and in effect is no concern of petitioners.

This contention is so lacking in substance that every time a similar question regarding the regularity of such hearings or the compliance with Section 128 has been raised the courts have promptly and unanimously rejected it.

In *Hoffman v. Stevens,* 177 F. Supp. 898 (D.C. Pa. 1959), the State Highway Department had advertised the project but no hearing was in fact held as the Department alleged that none were requested. The Court said:

> "Assuming arguendo a hearing was requested and was not held it would not give rise to any constitutional question so far as plaintiffs' rights are concerned. Certainly it is not sufficient reason for a federal court to assume jurisdiction under the due process clause. Combs v. Illinois State Toll Highway Commission, supra, 128 F. Supp. at page 310. The provision in § 128 was obviously intended to insure wise and fair use of federal funds. Under Pennsylvania law and policy, absent federal aid, such hearings are not required or held. *At best, failure to afford a hearing might give rise to a dispute between the Secretary of Commerce and the Pennsylvania Department of Highways as to the allocation and use of federal funds.* See and

cf. Piekarski v. Smith, Del. Ch. 1958, 147 A. 2d 176, 182; Binghamton Citizens Penn-Can Route 17 Highway Committee v. Federick, 3rd Dept., 1958, 7 A.D. 2d 170, 180 N.Y.S. 2d 913, 915." (Emphasis supplied.)

In *Linnecke v. Department of Highways*, 348 P. 2d 235 (Nev. Sup. Ct. 1960), the court said:

"The learned district judge filed a written opinion in denying the injunctive relief sought, holding first, that 'the giving of notice, the holding and the conduct of the public hearing, are matters of concern to the taxpayers of Nevada only insofar as they are conditions precedent to the authorization and grant of federal aid to the ultimate construction. If the notice should be insufficient, if the hearing is inadequate, if the required certificate is lacking, then the Bureau of Public Roads must determine that deficiency * * *.' He held, secondly, that in any event because of 'the hearing had, the consideration given to economic effects, and the certification made by letter, [these things] were sufficient to meet the broad and general requirements, and that there had been substantial compliance with the provisions of [the federal] act.'

"We have concluded that the judgment of the lower court was correct for both of the reasons given. The only requirement for a public hearing is the one quoted from the applicable section of the Federal Aid Highway Act. No such hearing is required by any such statute of this state. In a similar case the Supreme Court of Delaware had the same two questions for consideration. It said: 'But all the criticism of the public hearings is beside the point. The state law requires no public hearing. The federal statute, as already noted, does require such a hearing. The State must comply with the federal law to obtain federal funds. It has so complied, because the project has been approved by the Bu-

reau of Public Roads. The argument is beside the point.' Piekarski v. Smith, Del., 153 A. 2d 587, 593. . . ."

As noted from the foregoing quotations, the courts in New York and Delaware are in accord with these views. The Supreme Court of Wyoming in *Town of Clearmont v. State Highway Comm.*, 357 P. 2d 470 (1960) held exactly the same.

Petitioners make the frivolous claim on page 20 of their application that they will be deprived of their property in noncompliance with applicable federal law and that such "federal action constitutes a taking of their property without due process of law in violation of their rights secured under the 5th Amendment to the Constitution of the United States." No taking of property or eminent domain is involved in this case, and in fact most of petitioners do not even allege that they own property which is in the proposed right of way or will be required for the highway. But if or when any property is taken it will be by the State, not a federal taking, and the State has this power and can exercise it and build exactly this same highway without any reference to federal law or compliance with Section 128. The constitution and statutes of the State of Texas prohibit the taking of private property for public use without payment of just compensation and afford petitioners or other property owners adequate protection and legal remedies.

The following well established principles cited by the court in *Hoffman v. Stevens*, supra (177 F. Supp. at page 903), clearly show that petitioners have presented no substantial federal question and that their argument is entirely without merit:

"... 'The power of eminent domain is an attribute of sovereignty * * *. It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will.' State of Georgia v. City of Chattanooga, 1924, 264 U.S. 472, 480, 44 S. Ct. 369, 370, 68 L. Ed. 796. It is not dependent upon any specific grant. Albert Hanson Lumber Co. Ltd. v. United States, 1923, 261 U.S. 581, 587, 43 S. Ct. 442, 67 L. Ed. 809. With its exercise the United States has no right to interfere by any of its departments. Boom Co. v. Patterson, 1878, 98 U.S. 403, 406, 25 L. Ed. 206. The particular manner or source of payment is not plaintiffs' concern. Spann v. Joint Boards of School Directors, 1955, 381 Pa. 338, 350, 113 A. 2d 281.

"'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the XIV Amendment.' Bragg v. Weaver, supra, 251 U.S. at page 58, 40 S. Ct. at page 63; Joslin Mfg. Co. v. City of Providence, supra, 262 U.S. at page 678, 43 S. Ct. at page 689; Rindge Co. v. County of Los Angeles, 1923, 262 U.S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186; State of Georgia v. City of Chattanooga, supra, 264 U.S. at page 483, 44 S. Ct. at page 371. Whether a particular property is needed for public use is likewise a legislative or executive, not a judicial question. United States v. Carmack, 1946, 329 U.S. 230, 247, 67 S. Ct. 252, 91 L. Ed. 209, 18 Am. Jur. Em. Dom. §§ 105, 106."

Question No. 2

The gravamen of petitioners' argument under Question No. 2, relating to the hearing to comply with Article 6674w-1, Vernon's Civil Statutes of Texas, is that

the hearing did not afford any individual the opportunity to express his views *before the entire group attending the hearing*. Petitioners do not dispute that the hearing was in fact held, or that the design and schematic layout was presented and available, or that Highway Department personnel was on hand to discuss the plans.

The statute in question (quoted on page 5, supra) simply provides for a public hearing at which persons interested in the development of the project ". . . shall have the opportunity for *attendance, discussion* and *inspection* of the design and schematic layout . . ." (emphasis supplied). As seen from Mr. Smith's affidavit, quoted previously on pages 6 & 7, the meeting lasted from 10 a.m. to 6 p.m., during which time the plans and exhibits were available for inspection and discussion with Highway Department personnel, and it was only during the so-called "formal" part of the hearing commencing at 2 p.m., when Highway Department and Bureau of Public Roads personnel spoke from the stage and slides were shown to give detailed information on the design, that the audience was requested to confine that portion "to information from the stage." Full opportunity for the "discussion and inspection" of the schematic layout, as contemplated by the statute, was obviously afforded. Had the Texas Legislature wanted some quasi-judicial hearing, or had it wanted to provide petitioners an audience for their remarks, it could easily have so specified.

Respondents think it clear that the Court of Civil Appeals correctly held the public hearing was in full compliance with Article 6674w-1, and think it equally clear that no federal question is presented by this argument in any event.

CONCLUSION

Respondents respectfully submit that petitioners have not alleged any substantial federal question and that their contentions are entirely lacking in merit, and respectfully pray that the Application for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Waggoner Carr, Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondents; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage Prepaid, to Frank Y. Hill, Jr., 1707 Milam Bldg., San Antonio, Texas, and Ben F. Foster, 1800 Milam Bldg., San Antonio, Texas, attorneys for Petitioners.

WAGGONER CARR
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